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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1378

INTERCONTINENTAL INDUSTRIES, INC., PETITIONER

v.

AMERICAN STOCK EXCHANGE and
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 452 F. 2d 935. The opinion and order of the Securities and Exchange Commission (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1971. On March 9, 1972, Mr. Jus-

tice Powell granted a timely request to extend the time for petitioning for a writ of certiorari to April 25, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requirements of due process were met by the procedures followed by the American Stock Exchange in removing petitioner's stock from listing and registration on account of petitioner's violations of its listing agreement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States and Section 12(d) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78*l*(d), are set forth in the Appendix, *infra*, p. 12.

STATEMENT

Petitioner seeks review of the affirmance of an order of the Commission granting an application of the American Stock Exchange ("Exchange") to remove petitioner's stock from listing and registration on the Exchange. This application was based upon the facts, admitted by petitioner in a letter to its shareholders released July 18, 1969 (Pet. App. A4), that petitioner had, by means of public announce-

ments, press releases, and written material supplied to persons in the securities industry, disseminated and permitted the dissemination of materially false and misleading information concerning a planned acquisition of Prebuilt Homes, Inc. ("Prebuilt"), a builder of modular homes, and a proposed merger with Central Foundry Co. ("Foundry") and Capital Bancshares, Inc. ("Bancshares") (Pet. App. B3, B6). As a result of petitioner's announcements the market price of its stock increased dramatically (Pet. App. B7).

The Exchange determined that these facts revealed a violation of petitioner's listing agreement, which required petitioner to make prompt public disclosure of any material development in its affairs and operations which might significantly affect the market for its securities or influence investment decisions, that such disclosure be factual, and that restraint be used with regard to information which might be construed as over-optimistic, slanted or promotional in nature (Pet. App. A7-A8). Following a hearing held before its Committee on Securities, the Exchange found that there was no satisfactory explanation for the publication of the misleading and inaccurate information, that petitioner had failed to take corrective action promptly after its non-compliance with the disclosure requirements, and that therefore petitioner's stock was subject to removal from listing (Pet. App. B2-B3).

The Commission found that the information disseminated by petitioner "was misleading in material respects" (Pet. App. B3), that petitioner had failed to take prompt corrective action (Pet. App. B9),[1] and that petitioner had been afforded a fair hearing by the Exchange (Pet. App. B12-B13). The Commission therefore granted the Exchange's application. The court of appeals affirmed the Commission's order.

ARGUMENT

The court below correctly upheld the Commission's findings and order and the petition presents no question warranting further review.

1. In claiming a denial of due process in connection with the Exchange's determination to remove its stock from listing, petitioner points (Pet. 11-13) to the fact that there are no Exchange rules establishing procedures for delisting or governing the conduct of hearings such as the one held before the Exchange's Committee on Securities. It is well established, however, that due process "guarantees no particular form of procedure; it protects substantial rights." *National Labor Relations Board* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 351. Accord *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710.

[1] In fact, petitioner's letter to its shareholders, containing the first full disclosure of the facts, was released only after a consent injunction, in a suit brought by the Commission alleging violations of the antifraud provisions of the federal securities laws, was entered against petitioner (Pet. App. A6).

Accordingly, where no procedural standards governing action affecting private interests have been established by statute or rule, or where standards have been established but are inadequate, the constitutional requirements of due process are satisfied if the affected party has nevertheless been afforded a fair hearing. *Jennings* v. *Mahoney*, 404 U.S. 25; *Ferguson* v. *Thomas*, 430 F. 2d 852 (C.A. 5).

2. Petitioner argues (Pet. 14-17) that it was not accorded a fair hearing by the Exchange, contending that because the Exchange did not present any evidence that petitioner disseminated false and misleading information to the investing public in violation of its listing agreement, petitioner was injured by secret testimony and was not afforded the right to confront and cross-examine adverse witnesses. However, this argument overlooks the nature and purpose of the hearing. Prior to the hearing, petitioner, in the letter sent to its shareholders, had admitted facts constituting serious violations of its listing agreement with the Exchange. Since petitioner never disavowed or contested the facts set forth in this letter,[2] it was unnecessary for evidence to be presented by the Exchange to prove these admitted facts, to call witnesses to testify, or to accord peti-

[2] Indeed, petitioner could hardly claim that the facts in its letter were incorrect since under those circumstances the dissemination of the letter to stockholders would have constituted a further violation of the disclosure requirements in its listing agreement, as well as a violation of the consent injunction entered by the court in the Commission's action against petitioner (see note 1).

tioner an opportunity to confront and cross-examine witnesses. In view of petitioners admissions, the issues remaining for determination at the hearing were whether petitioner had made a diligent effort to ascertain the truth of the information concerning Prebuilt and Foundry and had undertaken prompt corrective action. Petitioner had an affirmative burden of proof which it did not meet.

At the hearing, petitioner was afforded full opportunity to present to the Exchange committee evidence bearing on the factual issue of due diligence in connection with its public announcements and on any other matters petitioner considered relevant to the question of continued listing of its stock. Petitioner availed itself of this opportunity, calling 19 witnesses, including officers of both petitioner and Prebuilt, and submitted documentary material in an attempt to show that the misstatements had been made in reliance upon documents reasonably believed by petitioner to be accurate. Petitioner's counsel also presented arguments to the committee on the question, *inter alia*, whether, under the Exchange's rules, petitioner took prompt corrective action. Under these circumstances, petitioner's claim of unfairness at the hearing is insubstantial; there is no denial of procedural due process in requiring petitioner to come forward with and assume the burden of presenting facts bearing on the defense of due diligence,[3] particularly

[3] Cf., *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 366 F. 2d 809, 812-813 (C.A. 5); *Specht* v. *Civil Aeronautics Board*, 254 F. 2d 905, 915 (C.A. 8); *Escott* v. *Barchris Construction Corp.*, 283 F. Supp. 643 (S.D. N.Y.).

where the imposition of such an obligation on petitioner placed the burden upon the party with knowledge of the facts.[4]

Petitioner asserts (Pet. 16) that it never admitted, and was never apprised, either in the notice of hearing or at the hearing itself, of charges in the delisting application that it disseminated misleading written materials to the public and supplied inaccurate information to a securities analyst which appeared in an article published in the *Wall Street Journal*. However, petitioner's letter to its shareholders did in fact admit its responsibility for the issuance of such misleading information and, as the court below observed (Pet. App. A11), the written notice informed petitioner "that the Exchange was considering delisting [petitioner's] stock [and], that this action was being contemplated because of the misleading information which had been disseminated about [petitioner], Prebuilt and * * * Foundry * * *." The court of appeals properly concluded that this notice "satisfied constitutional demands" (*ibid.*).[5]

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[4] See, *e.g.*, *United States* v. *Denver and Rio Grande Railroad Co.*, 191 U.S. 84, 91-92; *United States* v. *Hayes*, 369 F. 2d 671, 674 (C.A. 9); *National Labor Relations Board* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 176 (C.A. 2); *Erving Paper Mills* v. *Hudson-Sharp Machine Co.*, 332 F. 2d 674, 678 (C.A. 7).

[5] Moreover, after the Exchange filed its delisting application, a copy of which was furnished to petitioner, all the facts recited in that application remained uncontroverted by petitioner, even though the Commission, in reply to petitioner's request for a hearing before the Commission pursuant to Rule 12d2-2(c), 17 C.F.R. 240.12d2-2(c), specifically advised petitioner that if it contested the grounds on which the applica-

Petitioner contends (Pet. 17) that it should have been permitted at the hearing to examine the staff of the Exchange or its officials to ascertain the charges and to determine how the Exchange would apply its delisting policies. Since the members of the committee constituted the tribunal making the determination, petitioner in effect sought to probe the mental attitude of the adjudicators involved in the decisional process. Such probing is not permitted. *United States* v. *Morgan*, 313 U.S. 409, 422; *Woodbury* v. *McKinnon*, 447 F. 2d 839, 844 (C.A. 5); *San Francisco Mining Exchange* v. *Securities and Exchange Commission*, 378 F. 2d 162, 168 (C.A. 9). Furthermore, there was no unfairness in precluding petitioner from eliciting testimony of the Exchange staff for, as both the Commission (Pet. App. B12-B13) and the court of appeals (Pet. App. A10-A11) held, the notice given to petitioner, when considered with "due regard for the practicalities and the peculiarities of the case," *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, was sufficient to afford petitioner "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18.[6]

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tion was based, it "should furnish a full written submission" setting forth its reasons for concluding that the Exchange failed to comply with the delisting rules.

[6] Petitioner's charge (Pet. 13-14) that it was not afforded a fair hearing because a transcript of the proceeding before the Exchange committee was not made is without merit. The Commission found (Pet. App. B13) that petitioner's counsel declined an offer by the Exchange to provide a reporter at the hearing. Petitioner cannot complain of purported "preju-

3. Petitioner attacks (Pet. 18-19) as an unconstitutional "mixing of functions" the procedure whereby the Exchange committee, prior to the hearing, privately met with the Exchange staff that had performed the investigation into petitioner's violations of the Exchange's disclosure requirements.[7]

It is well settled that an organization, such as the Exchange, or, indeed, a governmental agency, may combine investigatory, accusatory and adjudicatory functions.[8] The courts have repeatedly held that the members of the agency, such as the individuals on the Exchange committee, may both consider an investigative report of the agency's staff apprising them of the facts that form the basis of charges and warrant the institution of proceedings and subsequently exercise their adjudicatory function upon the commencement of the proceeding. *E.g., San Fran-*

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dice" which was of its own creation. *Wright* v. *Texas Southern University*, 392 F. 2d 728, 731 (C.A. 5).

[7] Petitioner also attacks the participation in the final Exchange decision by those members of the Exchange who conducted the hearing. This contention is insubstantial. The identical procedure is expressly authorized for governmental agencies by Section 7(a) of the Administrative Procedure Act, 5 U.S.C. 556(b).

[8] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683; *Federal Trade Commission* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308, 1315 (C.A.D.C.); *San Francisco Mining Exchange* v. *Securities and Exchange Commission*, 378 F. 2d 162 (C.A. 9); *Pangburn* v. *Civil Aeronautics Board*, 311 F. 2d 349, 356 (C.A. 1); *Holt* v. *Raleigh City Board of Education*, 265 F. 2d 95, 98 (C.A. 4), *certiorari denied*, 361 U.S. 818; *Levers* v. *Berkshire*, 159 F. 2d 689, 693 (C.A. 10); *Belizaro* v. *Zimmerman*, 200 F. 2d 282 (C.A. 3).

cisco Mining Exchange v. *Securities and Exchange Commission, supra,* 378 F. 2d at 167; *Federal Trade Commission* v. *Cinderalla Career and Finishing Schools, supra,* 404 F. 2d at 1315; see also *Strathmore Securities, Inc.*, Securities Exchange Act Release No. 7864, *affirmed,* C.A.D.C., No. 20,175, *certiorari denied,* 387 U.S. 918; *Handley Investment Co.*, Securities Exchange Act Release No. 7438, *affirmed,* 354 F. 2d 64 (C.A. 10).[9]

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[9] *Wasson* v. *Trowbridge,* 382 F. 2d 807 (C.A. 2), cited by petitioner (Pet. 19), is not to the contrary. There it was claimed that the members of the panel who conducted the hearing had actually participated in the investigation as distinguished from the present case where the Exchange committee members properly had no contact with the investigation but simply received the staff's report containing facts which petitioner had already admitted and of which it was apprised.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

G. BRADFORD COOK,
General Counsel,

WALTER P. NORTH,
Associate General Counsel,

THEODORE SONDE,
Assistant General Counsel,

FREDERIC T. SPINDEL,
Attorney,

Securities and Exchange Commission.

JUNE 1972.

APPENDIX

Fifth Amendment to the Constitution of the United States:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

15 U.S.C. 78*l*(d):

> * * * A security registered with a national securities exchange may be withdrawn or stricken from listing and registration in accordance with the rules of the exchange * * * upon application by * * * the exchange to the Commission * * *.

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